



Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Canadian Commercial Corporation

File: B-246311

Date: February 26, 1992

Michael A. Gordon, Esq., Holmes, Schwartz & Gordon, for the protester.

Richard A. Wiggins for Loral TerraCom, an interested party.

Major H. Jack Shearer, and Clifton M. Hasegawa, Esq.,

Defense Communications Agency, for the agency

Aldo A. Benejam, Esq., and Andrew T. Pogany, Esq., Office of the General Counsel, GAO, participated in the preparation of the decision.

DIGEST

1. Agency properly determined to terminate contract and reopen discussions with offerors in the competitive range, including the awardee, where, shortly after award and in response to an agency-level protest, agency reasonably found that proposal upon which award was made was materially deficient because the proposed items did not comply with a technical requirement in the solicitation.

2. Reopening competitive range discussions after awardee's total price has been disclosed does not constitute an improper auction where reopening discussions is necessary to remedy an improper award; the statutory requirements for competition take precedence over regulatory prohibitions of auction techniques.

DECISION

Canadian Commercial Corporation (CCC) on behalf of Canadian Marconi Company (CMC)¹ protests the Defense Communications Agency's (DCA) decision to terminate a contract awarded to CMC under request for proposals (RFP) No. DCA200-91-R-0020,

¹CMC is a Canadian corporation and pursuant to applicable regulations, the CCC is the actual offeror. When CCC is awarded a contract, it subcontracts 100 percent of the contract to a Canadian corporation, such as CMC. See generally Dohrman Mach. Prod., Inc., 69 Comp. Gen. 22 (1989), 89-2 CPD ¶ 344. The protest was filed on behalf of CMC, which we hereafter refer to as the protester.

issued by DCA for three UHF wideband radio systems and supporting equipment, and to reopen discussions with the two offerors within the competitive range. CMC alleges that the agency's decision to terminate the contract is improper and contends that, since its proposed price has been disclosed, reopening discussions will result in an improper auction.

We deny the protest.

BACKGROUND

The RFP was issued on March 25, 1991, and contemplated the award of a fixed-price contract for the radio systems and equipment to be delivered during the base year, with up to two 1-year options for up to 23 additional radio systems and supporting equipment. The RFP required the successful contractor to supply all necessary electronics, cabling, hardware, technical manuals, tools and packaging necessary to deploy, install, and interconnect the radios. Award was to be made to the low, responsible offeror submitting a proposal that complied in all material respects with the conditions and mandatory requirements in the RFP.

Of the 32 firms solicited, only two offerors, CMC and Loral TerraCom, submitted timely proposals. Following an evaluation of initial proposals by a technical evaluation panel, DCA determined that both offerors were in the competitive range. The agency held written discussions with the firms and requested best and final offers (BAFO) from both offerors. On August 29, DCA determined that CMC was the low, responsible, technically acceptable offeror and awarded the contract to that firm.

Subsequently, Loral filed an agency-level protest challenging the award to CMC. Loral alleged that the radio systems CMC proposed did not meet five technical requirements in the RFP. On October 9, after reviewing Loral's allegations and CMC's proposal, DCA denied Loral's agency-level protest with respect to four of the five issues raised, but agreed with Loral that CMC's proposal was unacceptable with respect to one technical requirement of the RFP. Specifically, a review of CMC's proposal by DCA's technical experts concluded that the proposal upon which award was based was materially deficient and therefore unacceptable, because it did not meet certain requirements of paragraph 3.3.7 of the RFP's statement of work. DCA informed CMC that it would terminate CMC's contract and reopen discussions with both offerors. This protest to our Office followed. On November 4, in accordance with Federal Acquisition Regulation (FAR) § 52.212-13, the agency issued a stop-work order directing CMC to stop contract performance pending our decision.

PROTESTER'S CONTENTIONS

CMC alleges that the agency's proposed decision to terminate its contract is improperly based upon DCA's unreasonable interpretation of the RFP's requirements. According to CMC, the alleged technical deficiencies in its proposal are not material defects. Rather, CMC argues, they are minor contract administration issues which DCA should resolve through "touch up" clarifications with CMC, rather than by reopening discussions with both offerors. CMC also argues that since its price was disclosed, reopening discussions will result in an impermissible auction.

DISCUSSION

The solicitation section at issue here, paragraph 3.3.7 of the RFP, states in pertinent part:

"The transceiver must employ a comprehensive Built In Test Equipment (BITE) module. The BITE must provide the technician easy to read and understandable information on the operational status and problems with the radio, baseband interface, and the entire system. The BITE must also serve as the means to configure the radio. . . . The readout must not require look-up tables to understand."

That section further requires that specific information concerning various functions of the radio systems be monitored and/or displayed by the BITE, such as "receive signal strength, in dBm" and "bit error ratio."

The agency explains that the BITE display requirements, particularly the condition to provide the technician with easy to read and understandable information, are critical to the proper repair and operation of the equipment and are therefore material. The agency states that the required radio systems are to be used by the White House Communications Agency for Presidential support missions. As such, the required radio systems will be deployed to hotels, parking lots, and remote outdoor and other isolated locations where effective communications are crucial.

Given the sensitive nature of the Presidential missions, the importance of the communications circuits supported by the required radio systems, and the possibility of their deployment to remote locations, we think the agency reasonably determined that it is essential that technicians be able to quickly read the BITE display in order to effectively diagnose and repair a failed system. Consequently, we agree that a proposal that fails to comply with the BITE module display requirements is materially deficient and technically

unacceptable. For the reasons that follow, we find that CMC failed to comply with these requirements.

The record shows that the technical evaluation panel considered CMC's initial proposal unacceptable because, among other things, it failed to comply with the minimum BITE display requirements of paragraph 3.3.7. Panel members' evaluation notes show that, contrary to the requirements of the RFP, CMC's proposed BITE module did not display easy to read and understandable information; did not display "bit error ratio"; and did not display "receive signal strength in dBm," as required by the RFP. Further, despite the prohibition in paragraph 3.3.7 against the use of a readout requiring a look-up table to decipher, the evaluation panel found that CMC's proposed BITE display employed a mnemonic system that was difficult to interpret, and that essentially functioned as a look-up or translation table to cross-reference system status.

Based upon the results of the evaluation, DCA advised CMC in a June 13 letter that certain portions of its proposal appeared unclear, ambiguous, deficient, or indicated a lack of understanding of the RFP, and requested CMC to respond to 11 separate discussion items (DI) generated by the evaluation panel. In DI No. T007, which referenced paragraph 3.3.7 of the RFP and identified the corresponding section found deficient in CMC's proposal, DCA specifically asked the protester the following questions:

"1) Will the BITE be changed to be understandable, not requiring a translation table? 2) Will the BITE include receiver signal strength, in dBm, Bit Error Ratio and Loss of AC power?"

In a written response, CMC answered DI No. T007 by typewriting its answers at the bottom of the page containing the discussion item. In response to the first question, CMC stated that "[t]he BITE will be changed to be understandable and will not require a translation table. The new BITE display was proven readily understandable during the U.S. Marine Corps' evaluation of the AN/GRC-230 version of the radio set." In response to the second question, CMC stated that "[t]he BITE will include receive signal strength, in dBm, bit error ratio, and loss of AC power." Subsequently, DCA requested BAFOs from both offerors.

The record shows that upon review of CMC's proposal in response to Loral's agency-level protest, DCA found that CMC failed to submit any substantive technical information with its BAFO to reflect a BITE "changed to be understandable," or the "new" BITE displaying "receive signal strength, in dBm, and bit error ratio," in accordance with the firm's answers to DI No. T007. The agency explains that the

AN/GRC-230 radio CMC referenced in its response to DI No. T007, was not the radio CMC offered in its proposal. Further, the agency states that based on the protester's responses to DI No. T007, CMC's proposal contained insufficient information to determine whether and to what extent the proposed radio system would satisfy the requirements of paragraph 3.3.7 of the RFP.


We find that CMC's responses to DI No. T007, without more, did not have the effect of correcting the deficiencies in its initial proposal. CMC concedes that it was in fact previously offering a modified version of a radio different from the AN/GRC-230 which it referenced in its response. Yet, the firm did not submit any technical changes with its BAFO to reflect that change. We are not persuaded by the protester's argument that its previous response to DI No. T007 should have resolved any doubts as to the firm's intent to provide a BITE module that would comply with the RFP's requirements. CMC responded simply by essentially repeating, at the bottom of the DI page, the questions DCA presented in statement form. Although, based on its brief responses to DI No. T007, CMC apparently realized that certain changes to its proposal would be needed to make it acceptable, nowhere did the protester explain in any detail the extent or the nature of the technical changes it would make to its proposed system to make its proposal acceptable. We therefore agree with the agency that the protester simply failed to correct the material defects that DCA pointed out during discussions, leaving its proposal unacceptable.

The fact that CMC made blanket statements that the radio offered would, as modified, meet all of the RFP's specifications, including the BITE module display requirements, is irrelevant. Even in negotiated procurements, contracting agencies do not have discretion to disregard an offeror's failure to satisfy a material RFP requirement in its proposal. See Industrial Lift Truck Co. of N.J., Inc., Doering Equip., Inc., 67 Comp. Gen. 525 (1988), 88-2 CPD ¶ 61. Here, since the information required from CMC was essential to determine compliance of the firm's proposal with the material requirements of the RFP, CMC's proposal could not be corrected, except by conducting discussions. Given that the uncorrected deficiencies in CMC's proposal rendered the proposal technically unacceptable, we disagree with the protester's argument that these defects concerned minor issues of contract administration which could be resolved through "touch up" clarifications, rather than by discussions.

Discussions are to be distinguished from clarifications, which are merely inquiries for the purpose of eliminating minor uncertainties or irregularities in a proposal. FAR § 15.601; see also Industrial Lift Truck Co. of N.J., Inc.; Doering Equip., Inc., supra. It is fundamental that where discussions are held with one offeror, they must be held with all other offerors in the competitive range. Id. DCA could not properly hold discussions with only CMC. The agency's decision, therefore, to terminate the contract and reopen discussions with the offerors in the competitive range, is an appropriate means of remedying the improper award and provide CMC an opportunity to properly modify its proposal to comply with the RFP's material requirements.

CMC also challenges DCA's proposed action on the ground that since its price was disclosed to Loral, reopening discussion will result in an improper auction. As we have made clear in similar situations, the importance of correcting an improper award through further negotiations overrides any possible competitive disadvantage to an offeror. See Norden Sys. et al.--Recon., B-227106.3 et al., Oct. 16, 1987, 87-2 CPD ¶ 367. The statutory requirements for competition take primacy over the regulatory prohibitions of auction techniques. See The Faxon Co., 67 Comp. Gen. 39 (1987), 87-2 CPD ¶ 425.

The protest is denied.


for James F. Hinchman
General Counsel